Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

DERRICK K.H. WONG,

Petitioner,

v.

CHRISTINE M. WONG,

Respondent.

On Petition For Writ Of Certiorari
To The Hawaii Supreme Court
Intermediate Court Of Appeals
Of The State of Hawaii

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Family Court violated a divorced Father's due process rights when it made a variety of evidentiary rulings, which both systematically manifested an anti-male bias and enabled it to avoid finding that: (1) the divorced Mother had violated an amended divorce decree which specified Father's visitation, contact and information rights and, (2) said Mother was both in contempt and/or stood to have her custody rights significantly modified.

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OPINIONS BELOW

Pursuant to Sup. Ct. Rule 14(d), the October 26, 2005, opinion of the Intermediate Court of Appeals of the State of Hawaii, whose judgment is herein sought to be reviewed is contained in Hawaii Supreme Court Case Number 26726, the unpublished opinion of which is reprinted in the separate appendix to this Petition.

JURISDICTION

The opinion of the Intermediate Court of Appeals of the State of Hawaii was entered on March 3, 2006. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGUALTIONS INVOVLED

United States Constitution, Amendment V

No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV, Section 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Hawaii State Constitution, Article I, Section 5

No person shall be deprived of life, liberty, or property without due process of law; nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights because of race, religion, sex or ancestry.

Hawaii Revised Statute Section 571-46(9). Criteria and procedure in awarding custody and visitation

In every proceeding where there is at issue a dispute as to the custody of a child, a determination by the court that family violence has been committed by a parent raises a rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence.

STATEMENT OF THE CASE

This action stems from a motion for post-decree relief following the granting of a divorce. The *plain language* of the amended divorce decree stated that Father was to visit his very young sons *each* summer (six weeks)

as well as every other Christmas (two weeks). Father was also awarded *unlimited* telephone contact. In addition, Mother was to inform him of the children's school activities, grades, and health concerns.

The Evidence
Documents filed Prior to the Hearing

On May 4, 2004, Father filed a Motion to Modify Custody and/or Find Mother in Contempt. In his affidavit he noted that, after Mother moved to California, she waited three weeks before informing him of her telephone number. She also waited three weeks to notify him after she changed her address. When Father called to speak with his sons, she played the TV so loudly that Father had trouble hearing and then ignored his requests to turn the volume down. In addition, she would not return his calls after he left more than a dozen messages for his sons. She provided no information as to whether his children were even in school. Father received paperwork *from his insurance company* that medical benefits had been paid for his sons, but Mother would not tell him why these services were necessary. She did *not allow him any summer visit for 2003*. Thus, in September 2003, Father asked Mother to send the boys for Christmas 2003. Mother refused to do so because she could not afford it. Father's prior attorney wrote that it was the parties' intent that Father be awarded visits *both prior to Mother's move to California as well as during the summer of 2003.* In his another affidavit Father wrote that before his separation from Mother he would feed, bathe and play with his sons who would hug, play, and talk with him. However, after the move to California Devin did not want talk to Father over the phone and Dillon would yell, and had become both sad and less

talkative. In Christmas 2003, Mother had enough money to take the boys for a Las Vegas vacation.

On July 2, 2004, Mother filed a Responsive Affidavit. She referred to prior history that, in the original divorce, Father had been defaulted. She then played the negative male stereotype card that Father had an "aggressive attitude" and used politically correct terminology that he "put himself first before the children". She misrepresented that the summer visits were to *begin in 2004*. She urged that no Christmas visit during 2003 was possible due to geographical and financial constraints. Father would yell and raise his voice when he spoke to the boys on the phone. In addition, he would not call at "kid-centered times" and he demanded to be called back right away. She did admit "part" of the responsibility for not notifying Father of the medical emergency which had occurred. She then played another negative male stereotype card and alleged that Father resented paying child support. Using more politically correct terminology, Mother stated that she wanted the court to order Father to attend parenting classes.

Testimony at the Hearing
Preliminary Matters

At the hearing on Father's motion, Mother stated that Father had not established that a material change had occurred. Instead, both parents were only experiencing communications problems.

The Court asked Father what had materially changed. *Father's attorney stated that Father had not seen his sons for more than one year* even though visitation was supposed to begin in 2003. Further, Mother had denied him any Christmas visit, had not

informed him of the emergency room visit, and had not notified him as to what, if any, school the boys were attending. She disrupted Father's telephone contact and did not return messages. She moved twice and, thus, for six weeks Father was without contact information. She had changed jobs and did not notify Father as required. These efforts to alienate the children had succeeded.

Mother's Testimony

The Court then asked Mother to address Father's allegations. Mother stated the prior Judge had said she could move to California and that Father could visit with the kids before the move. The *prior Judge had also explained that because of their age, Father should come to California to visit them.* The Court overruled Father's objection to this testimony.

Mother stated that she *couldn't remember* any discussion with Father requesting a summer 2003 visit. Father did request a Christmas 2003 visit. However, because of her move, Mother couldn't afford to have to kids visit Father.

When she first moved to California, she gave Father the name and phone number her aunt and uncle. Father had her cell number and *she had the telephone records to prove* that Father had called her aunt. Father objected that he had received no such exhibits, but the Court overruled him. Mother admitted that she did not inform Father of her contact information for three weeks after she made a second move.

She also admitted that when the youngest boy went to the emergency room she did not inform Father.

Although both boys went to preschool, Mother had no records to give to Father.

Prior to the divorce, she attended parenting counseling. Both she and Father had been ordered to do so because they did not get along. The Court overruled Father's objection to this irrelevant testimony. Father did not attend these sessions and, as a result, he and she could not talk to each other.

Mother admitted that she was in near proximity to overhear the children talk to Father on the phone. Dillon would get overexcited and yell and she only told him to calm down. Also, there were times when the children did not want to talk on the phone. After the boys did not see Father for a whole year they ran up to him when they visited him in Hawaii in the summer of 2004.

The Court stated that it wanted the parties to be *mindful of time*, as the Court had a number of other hearings that morning. The court wanted to give the parties *the twenty minute period* during the morning, rather than set a Friday short trial, *because Mother had flown in from the mainland.* Father noted, however, that Mother was in Hawaii until the end of the next month. The Court admitted *it had not been aware of this when the hearing started.* Father then objected to the manner in which the Court was running the proceedings. Father, with the burden of proof, and had not been able to present any evidence and now time pressure was being raised. The Court stated that Father had spent some time *arguing* on his own behalf. Father reminded the Court that this was *in response* to points first raised by Mother. Mother then stated that she thought that she had "covered

everything". The Court then allowed Father to present his side of the case.

Father's Testimony

Father reserved his cross-examination of Mother in order to respond to Mother. The Court continued to push Father to move the hearing along.

Father had asked Mother twice for a summer 2003 visitation but Mother stated in a cocky tone of voice that she "didn't have to provide this according to the amended decree". When Father requested a Christmas visit, Mother stated that she did "not have enough money". Exhibit B showed he had paid Mother $1,950.00 in attorney's fees. Exhibit C showed that he had paid Mother $9,721.43 for her half of their joint debts. Exhibit H showed that he had sent her $952.03 for her half of the marital property assets. Exhibit J showed that he had sent her $1,995.25 for an individual retirement account and that he also continued to pay her $1,920.00 a month in child support. Thus, by time for the Christmas visit, Mother had received approximately $25,000, yet still claimed that she couldn't afford to pay her half of the children's airplane tickets.

Mother had admitted that she did not communicate with him on the children's medical condition. Father never received any school brochure. He didn't have telephone contact information for two three-week periods. Mother also changed jobs but did not notify Father.

Father testified that Mother had twice hit him in front of the boys. Mother objected and moved to strike said testimony. Father argued that evidence of

domestic violence was always relevant in deciding custody. The Court stated that Father had not raised this issue when the divorce *was originally granted.* Father reminded the Court that he had been defaulted and had not had the opportunity to raise this issue. The Court then sustained Mother's objection and struck the testimony. Father made an offer of proof that Mother had hit him and slapped and yelled at him in front of the children. The Court then asked Father if he had ever filed a restraining order against Mother. Father stated that he had not as he did didn't think it was in the children's best interests. The Court asked Father to move on and to watch the time.

Exclusion of Father's Exhibits

The Court stated that it was taking judicial notice of the entire record and files in the case. Father noted that this included his exhibits. Father stated that Exhibits "A" through "M" had already been moved in during the May 19, 2004 hearing. Father noted that the post-May 19 hearing exhibits were marked "N" through "G'" and that they had been included in the documents he had filed. The Court excluded "N", "O", "P", "E'" , and "G'. Father then testified that his second ("N") and third ("P") affidavits were true and correct and he thereby incorporated them into his testimony.

Court's Questioning of Mother

The Court then questioned Mother regarding her inability pay for her portion of the children's Christmas 2003 visit with Father. Mother stated that the attorney fees money sent to her by Father went directly to her attorney. She admitted that she did receive the $9,000 Father sent her for her one half of

the marital debts. Father asked what Mother did with the approximately $2,000 a month he was paying for child support. Mother stated that this money was not for airline expenses, but, rather, was for necessities. The Court asked whether Mother didn't have money left over. Mother said she did but she had to pay bills, and she didn't have enough for plane tickets.

Father made an offer proof that Mother had a credit card problem. He pointed out that the amended divorce decree itself it showed that Mother owed Bank of America $4,105.74 in credit card debt, Capital One $9,973.51 and Discover Card $3,319.95. This totaled up to $16,000 or $17,000 in credit card debt. Father contended that Mother didn't manage money properly, thus, even though he had paid her some $25,000 after the decree had been filed, Mother couldn't pay her half share of the children's air fare for the make-up Christmas 2003 visit.

The Rulings Below - The Family Court

The Court stated that there was conflicting testimony and that it was up to the Court to determine who was more credible. The Court then allowed the parties a closing of one minute each. Father asked that since he was movant could he make his argument first? Mother stated it should be brief and the Court agreed.

After "argument", the Court found that Mother had not interfered with Father's visits. The court stated that the problem was that Mother and Father did not communicate well and this was made more difficult by the fact that they did not reside in the same geographic area.

Before completing its ruling, the Court had an informal, on the record colloquy with Father. Father told the court that things would be fine if Mother had not moved the children to California. The Court responded "I know, but in today's world it's a reality" Father asked why his children had to suffer? The Court disagreed and stated that many families relocated after a divorce. Father asked why this occurred if the Court was concerned with the children's best interest? The Court stated that such a relocation made it hard on the parent without custody, but pointed out that it was not always the mom who had custody. The Court stated that was why it was saying that both Mother and Father had to learn to communicate more effectively. Father asked how he was supposed to guide his sons when he was geographically separated from them. The Court stated that "it's hard, you have to do it long distance and that Mother testified that she gave you the opportunity to visit for Christmas, you could have gone up, Mother couldn't afford tickets, there has to be give and take". Father stated "but I'm paying child support, if I don't work, I don't get paid". The Court stated "it's difficult". Father lamented "it's always my fault". The Court responded "Okay Mr. Wong". Father stated "I'm not a deadbeat dad, I pay child support and I can't see my children for over one year." The Court stated that "I understand your frustration, but if the reverse were true it'd be same thing." Father disagreed, "No, I would never move the children away from her." The Court stated that "[Mother] had to move to the mainland for employment or to be closer to her family". "She didn't move to punish you, in your mind you're thinking she did." "She decided she would have a better life and the court allowed her to take the children". "Again, there's a basic communication problem here."

The Court next turned to Mother and stated that it was "making no finding of contempt today." However, Mother was to "understand Father's attorney that if Mother did not follow the divorce decree, eventually the Court could find her in contempt and that there are severe sanctions that would apply." The Court added, to Mother, "You said you don't get along, that you have a hard time communicating". "The decree says you both have joint legal custody". "Make sure he receives copies of school and/or medical records". "Send copies of whatever activities they may have if they participate in something and do it in a timely manner." The court added, "If your phone number or address changes, let him know right away."

The Court found that there had been no material change in circumstances to warrant an inquiry into changing custody. Thus, the Court denied Father's request to transfer the children's custody. It also denied his request to grant him twelve weeks of visits during the summer of 2004. On the issue of the Christmas 2004 visit the court asked what the time frame was. Mother stated that she had just received the new school calendar. The Court stated that Father needed to get a copy. The Court said it wanted to set the time frame for the Christmas visit today. Mother stated that the school was changing the calendar and that the children had four weeks off. The Court stated that Father should then have four weeks for visitation. Mother stated that she agreed and that the time off began on December 13 and ended on January 7. The Court stated that it wanted Mother and Father to work out specific dates so the children would be returned the day before they went back to school. Mother asked if one day was okay because the children were at such a young age. The Court stated

that one day was fine and that the Court wanted Mother and Father to make travel arrangements because it would minimize costs. The Court told Mother to make it four weeks this Christmas but in the future it would not order four weeks. The Court stated that the total Christmas visit period should be three weeks. Thus, the Court granted Father's request for an extended 2004 Christmas visit. However, the Court stated that it would not order twelve weeks of visitation for summer 2005. The Court then denied Father's request to make increased summer and Christmas visits permanent. The Court also denied Father's request for a custody evaluator.

Violation of Father's Due Process Rights Raised on Appeal

In his opening brief, filed on December 2, 2004, Father raised the argument that the Family Court committed reversible error when it manifested bias against him so as to deny him due process. Father argued that Mother deliberately painted a negative personality picture of him (which the Court read) prior to the hearing. He stated that the family court, influenced by mother's negative picture of him, denied him due process in a series of evidentiary rulings. One, as a result of bias, the Court mishandled the mode and order of presentation of evidence. Two, as a result of bias it admitted irrelevant and/or unfairly prejudicial evidence. Last, as a result of bias, it misapplied the rules of evidence, unfairly administered the case, unjustly determined the proceedings, and did not ascertain the truth of the children's situation.

The Family Court manifested Bias against Father so as to Deny him Due Process

Father stated that the Fifth Amendment to the United States Constitution states that "no person shall be. . . . deprived of life, liberty or property without due process of law". Article I, Section 5 of the Hawaii State Constitution makes equivalent provision. A parent has a liberty interest in a developed parent-child relationship. Lehr v. Robertson, 463 U.S. 248, 103 S Ct. 2985, 72 L. Ed. 2d 614 (1983). The due process clause requires a fair hearing before an impartial court. Schweiker v. McClure 456 U.S. 188, 102 S. Ct. 1665, 72 L. Ed 2d 1 (1982)

Father noted that in a fair tribunal, it is fundamental that judges shall apply the law impartially and free from influence of any personal biases. Donald C. Nugent, Judicial Bias, Cleveland State Law Review, Wntr 1994 v42 n1 p1-59. Judges' search for truth, however, is hampered by natural perceptual processes that occur when they extract, organize and use information. Their brains use simplifying strategies, called schemata, which help reduce and integrate complex information. The overloaded Family Court, however plagued with constraints of time, exacts a price paid for efficiency - this price is bias in perception and judgment. Judges' perceptions become schemata-driven; i.e., impervious to new information. Information that confirms to schemata draws attention; i.e., an expectancy-confirmation bias. When judges attend to information that varies greatly from their existing beliefs, they will often discount, redefine or distort it. In order to alleviate psychological discomfort, judges will realign facts or creatively interpret the law. Positive adaptation to stereotypic traits elicits selective evidence processing, i.e., evidence which corroborates a stereotype's implications is more often incorporated into decision-maker thinking. Judges' decisions are

influenced by such factors as their legal and political orientations. This process can result in distorted and systematically biased decisions.

Gender bias is one example of a perceptual basis for distorted decision-making. This involves misconceptions about the social and economic realities of men's lives. Such misconceptions are prevalent in the justice system and are seen most frequently in the area of Family Law. Gender-based biases negatively impact the treatment of cases. Child custody is an arena where bias concerning both sexes influences decision-making. Bias against fathers is witnessed by the persistent application of the "maternal preference doctrine". Although eliminated from the books, it still operates in practice. The perpetual assumption is that mothers are characterized as self-sacrificing and nurturing and are better caregivers. Fathers are perceived as less capable and must prove their ability to parent.

Mother's Pre-Hearing Documents Deliberately Painted a Negative Personality Picture of Father

Father noted that Mother's Responsive Affidavit attempted to paint a negative personality picture of him as both a bad litigant as well as having inadequate parenting skills.

The Family Court, influenced by Mother's Negative Picture, made a Series of Evidentiary Rulings which denied Father Due Process

(1) The Family Court Mishandled the Mode and Order of the Presentation of Evidence

Father stated that Hawaii Rule of Evidence ("HRE"), Rule 611 required the court to exert reasonable control over the mode and order of presentation of evidence so as to make it effective for the ascertainment of truth. Father as movant had to sustain the burden of proof. However, the Family Court creatively interpreted the law and, thus, had Mother present her side of the case first. Then, before Father could present evidence, the Court attempted to cut off the taking of evidence. The Court only allowed Father to present evidence after Mother stated that she had "covered everything". However, it did so under such tremendous time pressure that it hampered his presentation and unduly curbed his testimony as well as his cross-examination of Mother.

(2) The Family Court Admitted Irrelevant and/or Unfairly Prejudicial Evidence

Father wrote, on appeal, that the Family Court, operating on an unarticulated maternal preference bias, creatively interpreted the law to allow Mother to testify that, *prior to the original divorce decree being granted*, she had attended parenting counseling while Father did not. The Court overruled Father's objection to this irrelevant and unfairly prejudicial evidence which operated as an expectancy-confirmation bias.

Father also wrote that, by statute, a determination that family violence has been committed raises a rebuttable presumption that it is not in the best interest of a child to be placed in sole custody with the perpetrator. Father attempted to testify that Mother had hit him a couple of times in front of the boys. Mother objected. Despite the statute, the Court sustained Mother's objection and granted her motion to strike this testimony.

(3) The Family Court Misapplied the Rules of Evidence, Unfairly Administered the Case, Unjustly Determined the Proceedings, and did Not Ascertain the Truth of the Children's Situation

Father noted that the Family Court allowed Mother to testify, over objection, that the Judge presiding at the divorce hearing said that, because of the boys tender ages, Father should travel to California. It also allowed Mother to testify, over objection, that she had telephone records to prove that Father had called her people in California. The Court, thus, used its power to realign the pre-hearing documentary facts and to creatively interpret the law. It also excluded Father's Exhibits "N", "O", "P", "D'", "E'", and "G'" It consistently admitted hearsay, when offered by Mother, but excluded hearsay when introduced by Father.

The Rulings Below - The Intermediate Court of Appeals ("ICA")

The ICA addressed Father's due process arguments as follows. Point of Error Number One, it held that the family court did not abuse its discretion when it allowed Mother to testify first at the hearing and then required that he counter her evidence and present his own evidence under such tremendous time pressure that it effectively hampered his presentation. Point of Error Number Two, it held that the family court did not abuse its discretion when it allowed Mother to testify that, prior to the original decree being granted, she had attended parenting counseling while Father did not. Point of Error Number Three, it held that the family court did not abuse its discretion when it

admitted Mother's hearsay evidence while excluding Father's hearsay evidence.

In affirming the Family Court's decisions regarding custody and contempt, the ICA, nonetheless, vacated the following findings of fact numbers. (1) FOF 8 Plaintiff's testimony that Judge Suemori had suggested that Defendant should go to visit the children in California, (2) FOF 15 Mother's testimony that the school pamphlet had been sent to Defendant, (3) FOF 17 Mother's belief that parenting counseling would have helped the parties in communicating with each other, and FOF 18 that Mother had not interfered with Defendant's telephone communications with the children.

It also remanded the case for reconsideration of: (1) the issues presented by vacated FOF no. 15; i.e., that Mother had violated this provision of the order contained in the Amended Decree by not sending the school pamphlet to Father *herself*; (2) whether FOF no. 18 was clearly erroneous and, if it was, what should be done about it; i.e., the finding that Mother had not interfered with Father's telephone communications appeared to be clearly erroneous as Mother had admitted to recording those conversations while "nearby" the children. Absent evidence to the contrary, the ICA noted that it was reasonable to assume that the children were aware of these recordings; (3) what should be done regarding the violations noted in FsOF nos. 13 and 14; (a) FOF No. 13 stated facts proving Mother's violation of orders contained in the Amended Decree; i.e., Mother did not immediately inform Father of her new address and phone number when she moved to her own apartment; and (b) FOF No. 14 stated facts proving Mother's violation of orders contained in the Amended Decree;

i.e., Mother did not inform Father when the parties' son went to the emergency room for treatment; (4) whether the parties had the financial ability to comply with the visitation orders, and (5) the visitation orders in light of: (a) the fact that Mother and Father did not communicate well with each other, and (b) the financial abilities of the parties.

ARGUMENT/REASONS FOR GRANTING THE WRIT

Certiorari should be Granted to Correct the Intermediate Court of Appeals' Sanctioning of the Family Court's Biased Handling of the Case

The Family Court Failed to Afford Father Due Process

Mother's Responsive Affidavit painted a negative personality picture of Father as both a bad litigant as well as an inadequate parent. Mother did this through the use of negative male stereotypes and/or "politically correct" terms designed to trigger the Family Court's schemata driven perceptions; i.e., its unspoken reliance upon the maternal preference doctrine. Thus, Mother mentioned Father's being defaulted, his so-called "aggressive attitude", his "putting himself before the children", as well as his "resentment towards paying child support". None of these unproven, character-bassed allegations was relevant to the issues Father had raised in his motion.

Thus, at the hearing upon Father's motion, the Family Court, in an abuse of the discretion afforded it under Hawaii Rule of Evidence Rule 611, allowed Mother to set the litigation agenda. The Court only heard *argument from Father's attorney* before it

allowed Mother's testimony to use up most of the *twenty (20) minutes it had allocated for the entire hearing*. The allocation of a mere 20 minutes to hear a case wherein a divorced Mother had allegedly blocked two toddlers from seeing their Father as required by a court decree itself violated due process as said case could not be heard in a meaningful manner under this time constraint. See, Barry v. Barchi, 443 U.S. 55, 99 S. Ct. 2642, 61 L. Ed. 2d 365 (1979). Even after the Court admitted that it had not properly set the case for a short trial it continued to pressure Father to carry his burden in the matter of minutes remaining after Mother's presentation. The Court acted as a de facto assistant counsel for Mother, denying Father due process, when it: (1) allowed her to determine when Father could begin presenting his case, as well as (2) rubber stamped all of her objections to Father's exhibits.

Further, the Court allowed Mother to introduce, over objection and contrary to Hawaii Rules of Evidence Rules 401 and 403, several key items of irrelevant and/or hearsay evidence. One, Mother was allowed to testify that the prior Judge stated that Father should travel to California to visit his boys. This violated due process as Father was not able to cross examine the Judge. Further, said statement was allowed to effectively undermine the plain, written language of the decree which required Mother to cooperate in having both boys visit Father every summer, including the summer of 2003. Two, Mother was allowed to testify that she had telephone records that proved Father had, in fact, contacted her relatives. The admission of this evidence violated due process as Mother had not provided any such records to Father's attorney. Nor did she attempt to introduce them at the hearing on Father's motion. They simply do not exist

anywhere in the records and files of this case. Yet the Court admitted this testimony which cut against Father's credibility. Ultimately the Court decided the case against Father based on a credibility determination. Last, Mother was allowed to testify that Father failed, prior to the divorce being granted, to attend parenting counseling with Mother. The admission of this testimony violated due process as it *concerned events which transpired prior to the amended decree being issued* by the Court. In addition, it relied upon a doubtful assumption that somehow Mother was a more effective parent than Father simply because she attended these sessions. [Query: How could Mother be such an effective parent if she could not put aside her personal "communication difficulties" with Father and facilitate his visitation with their sons? The record suggests that what Mother did glean from said sessions was the ability to use "politically correct" buzz words in her efforts to use her children to act out in an angry manner against Father.]

In addition to admitting the above testimony, the Court deprived Father of due process when it excluded his testimony that Mother had engaged in domestic violence in front of the children even though evidence of such non-maternal preference conduct has been specifically made relevant via Hawaii Revised Statute Section 571-46(9). The Court compounded this mishandling of the hearing, when Father next made an offer of proof of these same facts, by cross examining him and then ruling against him. This was a classic example of the Court's reliance upon gender bias as, to the Court's thinking, domestic violence conduct by Mother conflicted with the Court's unstated maternal preference doctrine. Simply put, the Court refused to contemplate that Mother could have hit

Father in front of the boys because, as a woman, she was assumed to be more self-sacrificing, nurturing and/or a better care giver than he was simply because he was male.

The Court also deprived Father of due process, as well as abused the discretion afforded it under Hawaii Rule of Evidence Rule 102, when it excluded several of his exhibits which contained evidence that: (1) the intent of the amended decree was to have Father visit the boys both before their California move as well as during the summer of 2003, (2) Mother had stated that Father's family would never see the boys again and that she contemplated suicide, (3) Mother told the prior Judge that, upon arrival in California, she would be placing both boys, the youngest of whom was two and a half years old, in pre-school, (4) Mother took the boys to Las Vegas for a Christmas vacation in 2003 when she claimed to have insufficient funds to allow them to visit Father, and (5) in contradiction to the Court's politically correct thinking, experts had stated that Fathers were very important to the socialization of their children.

The Court made a cursory attempt to question Mother as to why she was unable to use the $25,000 Father had sent her to purchase half of the air fare for the boys to visit him during Christmas 2003. It accepted without question, however, Mother's claim to not have any money left over after expenses and ignored Father's evidence that Mother had a problem in misusing credit cards. Mother's credit card problem was arguably evidence of an underlying unstable emotional state which both cut against her maintaining custody of the boys as well as helped explain her non-compliance with the amended decree. Thus, in keeping with its need to discount, redefine

and/or distort information that varied from its unspoken reliance on the maternal preference doctrine, the Court chose not to delve into any deeper implications of Mother's money mismanagement issues. In doing so, it deprived Father of due process.

After the Court had creatively interpreted the law to distort the record in front of it, it concluded that: (1) Mother was more credible than Father, (2) she had not interfered with Father's visitation, and (3) the real problem was that the parties did not "communicate" well.

The Court's colloquy with Father revealed the depth of its underlying anti-male reliance upon the maternal preference doctrine. One, the Court assumed, without any investigation, that Father could afford to visit the boys in California. This was not true. Two, the Court totally ignored Mother's prevention of the two toddlers from visiting Father for a year despite the plain language of the amended decree. In doing so, the Court also assumed that no emotional and/or psychological harm befell the boys. Three, the Court assumed that Mother's removing the boys from Father consistent with being a nurturing parent. Father stated that, had physical custody been his, he would not have taken the boys away from Mother. Four, the Court bought into Mother's claim to be the better parent, i.e., the parent who put the children's needs first. However, her actions of removing the boys from Father for a year, in contravention of the amended decree, so she could receive "family support" and earn a living, showed that she put her needs first. Finally, the Court showed its "empathy" for Mother by noting that her move to California with the boys was not done to "punish" Father. To reach this conclusion, given the record in this case, the Court discounted, redefined

and/or distorted the evidence presented both before and during the hearing.

To somewhat cover its tracks, the Court next warned Mother that she had to follow the decree better or else she would be found in contempt. Thus, the Court counseled Mother to make sure Father received copies of school and/or medical records in a timely manner. The Court then denied all of Father's requests with the exception of allowing him two extra weeks of Christmas visitation on a one time basis only.

The ICA Sanctioned the Family Court's Mishandling of the Hearing

The ICA merely noted Father's contentions that the Family Court had violated Father's due process rights and mishandled the case in a biased manner. Ignoring Father's due process argument entirely, the ICA held that the Family court had not abused its discretion when it: (1) allowed Mother to testify first and then used time pressure to deprive Father of any meaningful opportunity to present evidence, (2) allowed Mother to introduce evidence of Father's, pre-divorce, non-attendance at parenting counseling, and (3) admitted Mother's irrelevant hearsay while excluding Father's relevant hearsay.

Having thus sanctioned the Family Court's denial of due process to Father, the ICA, in its effort to spot trees while not seeing any forest, vacated several findings of fact. It vacated the following findings of fact: (#8) Mother's testimony that the prior Judge had suggested Father should go visit the boys in California, (#15) Mother's testimony that the school pamphlet had been sent to Father, (#17) Mother's belief that parenting counseling would have helped the parties in

communicating with each other, and (#18) that Mother had not interfered with Father's telephone communications with the children. The ICA also remanded the case for a reconsideration of FsOF: (#13) Mother's failure to immediately inform Father of her new address and phone number when she moved to her own apartment, and (#14) her lack of informing Father when the parties' son went to an emergency room for treatment.

In response to the ICA's white washing of the Family Court's denial of due process to Father, he filed a timely Application for a Writ of Certiorari to the Hawaii Supreme Court. Said application was summarily denied.

CONCLUSION

Wherefore, Petitioner respectfully prays that a writ of certiorari be granted.

DATED: Honolulu, Hawaii, August 1, 2006.

Respectfully Submitted

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Attorney for Petitioner
DERRICK K.H. WONG

I. NOTICE AND JUDGMENT ON APPEAL

NO. 26726

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

CHRISTINE M. WONG	)	FC-DIVORCE NO.
	)	02-1-2233
Plaintiff-Appellee,	)	
	)	APPEAL FROM THE
vs.	)	ORDER DENYING
	)	MOTION TO MODIFY
DERRICK H. WONG,	)	CUSTODY AND/OR
	)	HOLD PLAINTIFF IN
Defendant-Appellant	)	CONTEMPT OF
	)	AMENDED DIVORCE
	)	DECREE FILED
	)	05/14/04

FIRST CIRCUIT COURT

HONORABLE ALLENE SUEMORI
HONORABLE WILLIAM WALLACE
HONORABLE DARRYL CHOY
HONORABLE CHRISTINE KURIYAMA
HONORABLE GREGG YOUNG
Judges

NOTICE AND JUDGMENT ON APPEAL

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FIRST CIRCUIT COURT

HONORABLE ALLENE SUEMORI
HONORABLE WILLIAM WALLACE
HONORABLE DARRYL CHOY
HONORABLE CHRISTINE KURIYAMA
HONORABLE GREGG YOUNG
Judges

NOTICE AND JUDGMENT ON APPEAL

TO THE HONORABLE PRESIDING JUDGE OF THE FAMILY COURT OF THE FIRST CIRCUIT, STATE OF HAWAII:

PLEASE TAKE NOTICE that the following Judgment on Appeal is entered this day by the Intermediate Court of Appeals of the State of Hawai'i:
Pursuant to the Memorandum Opinion of the Intermediate Court of Appeals of the State of Hawai'i, filed October 26, 2005, we affirm the court's decisions regarding custody and contempt; vacated the Finds of Fact nos. 8 and 15, the last sentence of Finding of Fact No. 17, and the second sentence of Finding of Fact no. 18; and remand for reconsideration (1) of the issues presented by vacated Finding of Fact no. 15, (2) whether Finding of Fact No. 18 is clearly erroneous and, if it is, of what should be done about it, (3) of what should be done regarding the violations noted in Finds of Fact nos. 13 and 14, (3) whether the parties have the financial ability to comply with the visitation orders, and (4) of the visitation orders in light of (a) the fact that Christine and Derrick do not communicate well with each other, and (b) the financial abilities of the parties.

DATED: Honolulu, Hawaii, March 3, 2006.

BY THE COURT:

s/ L. Nakagawa
Clerk

APPROVED:

s/ James s. Burns
Judge
SC 26726 – Wong v. Wong

II. ORDER DENYING APPLICATION FOR A WRIT OF CERTIORARI

NO. 26726

IN THE SUPREME COURT OF THE STATE OF

HAWAII

CHRISTINE M. WONG,
Respondent-Appellee,

vs.

DERRICK K. H. WONG,
Petitioner-Appellant

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(FC-D NO. 02-1-2233)

ORDER DENYING APPLICATION FOR WRIT OF CERTIORARI
(By: Moon, C.J., for the court[1])

Petitioner-appellant Derrick K.H. Wong's application for writ of certiorari, filed November 25, 2005, is denied.

DATED: Honolulu, Hawaii, December 6, 2005.

Brian Custer, for petitioner-appellant, on the writ

FOR THE COURT:
s/ Ronald T.Y. Moon
Chief Justice

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[1] Considered by : Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.

III. INTERMEDIATE COURT OF APPEALS OPINION

NOT FOR PUBLICATION

NO. 26726

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

CHRISTINE M. WONG, Plaintiff-Appellee, v.
DERRICK K.H. WONG, Defendant-Appellant

APPEAL FROM THE FAMILY COURT
OF THE FIRST CIRCUIT
(FC-D NO. 02-1-2233)

MEMORANDUM OPINION
(By: Burns, C.J., Lim and Nakamura, JJ.)

Defendant-Appellant Derrick K.H. Wong (Derrick or Defendant) appeals from the July 7, 2004 "Order Denying Motion to Modify Custody and/or Hold Plaintiff in Contempt of Amended Divorce Decree Filed May 14, 2004"[1] (July 7, 2004 Order) entered in the Family Court of the First Circuit.[2]

We affirm in part, vacate in part, and remand for reconsideration of specified issues.

---

[1] The Motion to Modify Custody and/or Hold Plaintiff in Contempt of Amended Divorce Decree was actually filed on May 4, 2004.

[2] Judge Christine Kuriyama presided.

BACKGROUND

Plaintiff-Appellee Christine M. Wong (Christine or Plaintiff) and Derrick were married on July 25, 1998. Their first son was born on February 23, 2001. Christine filed a Complaint for Divorce on July 8, 2002. On July 5, 2002, Derrick filed an answer.

On February 11, 2003, Alvin Kaohu Nishimura withdrew as counsel for Derrick, and Katherine Puana Kealoha entered her appearance as substitute counsel.

On March 27, 2003, Judge William K. Wallace III granted Christine's oral motion to default Derrick "for his and his counsel's failure to appear at the Notice to Set Hearing [,]" and ordered that "[t]he Decree submitted by [Christine] as her Exhibit 1 to her Motion to Set shall be entered & filed as the decree in this case." On April 3, 2003, the Decree Granting Divorce and Awarding Child Custody (April 3, 2003 Divorce Decree) was filed. In relevant part, it granted the divorce, noted that Christine was relocating to southern California, awarded joint legal custody, awarded Derrick specific visitation rights, ordered Derrick to pay $960 per month child support for each child, and ordered Christine to maintain medical and dental coverage for the children.

On April 3, 2003, counsel for Derrick filed Defendant's Motion to Set Aside Order for Default Judgment (April 3, 2005 Motion) stating that she had not been informed "that any Motion to Set was to be heard on any given date." The motion did not say what Derrick did not like about the April 3, 2003 Divorce Decree. On April 23, 2003, counsel for Christine filed a response stating, in relevant part:

> The Motion to Set was scheduled for hearing on March 27, 2003, at 10:00 a.m., and, for over a month, from after the Withdrawal and Substitution was filed, until the default was entered, *new counsel never called or communicated with [Christine's] counsel*. . . .
>
> . . . .
>
> [Derrick's] failure to file a position statement or financials or even appear in court is consistent with [Derrick's] failure to defend his case ever since [Christine] was granted custody and child support pursuant to [Christine]'s Motion for Pre Decree Relief, the last hearing on which was held almost 6 months earlier, on August 14, 2002.

(Emphasis in original.)

On April 24, 2003, counsel for Derrick filed a supplemental declaration in support of the April 3, 2003 Motion in which counsel explained that her office had been closed from February 7, 2003 through March 20, 2003 due to an extreme family emergency and that she had not been informed of the hearing on the motion to set.

On May 7, 2003, after a hearing on April 24, 2003, Judge Allene R. Suemori denied Derrick's April 3, 2003 Motion and entered an order (May 7, 2003 Order) stating:

> [Derrick] agrees with all the terms of the Decree signed & filed on April 3, 3003 except the provisions relating to visitation

wit the children as set forth in section 2 b). of the Decree. The parties stipulate to amend those provisions as set forth below. Said Amended Decree shall be submitted by May 2, 2003.

. . . .

The provisions relating to visitation shall be amended by adding the following paragraph at the end of Section 2.b):

As [Christine] will be moving to California on or about June 1, 2003 [Derrick] shall have visitation with the boys for the weekends April 25, May 2nd, May 16, and May 23rd. Additional visitation, as the parties' work schedule allows, shall be as agreed upon by the parties, with 24 hours notice given to [Christine].

In a letter to Judge Suemori dated May 1, 2003, and filed on May 12, 2003, counsel for Derrick stated in relevant part:

> On April 24, 2003, we cam before your Honorable Court on a Motion to Set Aside Default Judgment in the above named case. The Motion was deemed moot, because the terms and conditions of the Decree were fair and equitable, with agreement of the Court. I have reviewed the Decree and the terms with my client, and he had asked for only one change regarding the tax exemptions status. He requested that the tax exemption status be alternated between [Derrick] and [Christine], [Christine] receiving tax exemption for the kids in the odd years (this year) and [Derrick] receiving exemption for the kids in the even years

(starting new year 2004). [Christine] would not agree to this modification, and according to [the partner of counsel for Christine] we are to leave it up to the Court.

On May 13, 2003, the Amended Decree Granting Divorce and Awarding Child Custody (May 13, 2003 Amended Decree) was entered. It allowed Christine all of the tax exemptions for the children and stated, in relevant part:

a. General

The parties are awarded joint legal custody of the children. Mother is awarded sole physical care, custody and control of the children subject to Father's rights of visitation as set forth below. Father shall have unlimited telephone contact with the boys during reasonable hours considering the boy's age and usual daily activities. Mother shall keep Father informed of the boy's [sic] school activities and grades, sending him reports in a timely fashion. Both parties shall keep each other informed of any health concerns or doctor's reports. Both parties shall keep each other informed of their current resident addresses, phone numbers and the names of individuals to contact in case of emergency as long as there is a child support obligation.

b) Visitation: Mother is relocating to southern California. Thus, Father shall have visitation every summer for 6 weeks. The boys shall be with Father every other

Christmas/New Year's vacation as arranged by the parties. Any additional visitation shall be as arranged by the parties. When Father is passing through the geographical area where Mother and the boys are living, Father shall be entitled to visitation so long as said visitation does not interfere with the boys [sic] usual school activity schedule and Father has given Mother forth-eight hours' notice of his intent to visit.

The boys shall not travel alone, but shall be personally escorted by, on the trip to see Father, by Father, or his substitute, and, on the return trip, by Mother, or her substitute, until the boys are of sufficient age and maturity to travel safely on their own, but in any case not before they turn 13 years of age. The substitute should be a person or persons whom the boys know and with whom they feel comfortable. The substitute escort shall be agreed upon in advance, and if there is no agreement the parent who has the boys does not need to send the boys with said person(s), but approval of the escort(s) shall not be withheld without good cause, or else the withholding party shall be liable for any and all costs, including legal fees, associated therewith.

For the boys' summer and Christmas vacation time with Father, the parties shall split evenly the boys' [sic] transportation costs, but pay all of their own, or all of their substitute's transportation expenses. Father shall assume all costs for any other

visitation time he and Mother may agree upon. The parties shall cooperate to save on travel expenses and insure that the travel dates are reasonably convenient for all.

As mother will be moving to California on or about June 1, 2003, Father shall have visitation with the boys for the weekends April 25, May 2nd, May 16 and May 23rd. Additional visitation, as the parties' work schedule allows, shall be as agreed upon by the parties, with 24 hours notice given to Mother.

On June 30, 2003, Katherine Puana Kealoha withdrew, and Brian Benham Custer entered his appearance, as counsel for Derrick.

On July 3, 2003, Derrick filed a notice of appeal from the March 27, 2003 Order Granting Motion for Default. On January 7, 2004, the Hawai'i Supreme Court entered an Order Dismissing Appeal on the ground that the notice of appeal was not timely filed.

On May 4, 2004, Derrick filed a Motion to Modify Custody and/or Hold Plaintiff in Contempt of Amended Divorce Decree (May 4, 2004 Motion). In this motion, Derrick sought sole custody of the children, modification of visitation orders, sanctions against Christine for violations of custody and visitation orders, appointment of a custody evaluator, and the award of attorney fees. In an April 9, 2004 supporting affidavit, he alleged the following:

1. When Christine initially moved to California, she waited for three weeks before she informed Derrick of her telephone number.

2. When Christine changed her address, she waited three weeks before giving Derrick her new phone number.

3. On two occasions, when Derrick called and spoke with his sons, Christine was playing the TV so loud that it interfered with their conversations, and when Derrick asked Christine to turn the volume down, Christine ignored Derrick's request.

4. On more than a dozen occasions when Derrick called and no one answered, Derrick left messages and Christine never returned these calls.

5. Derrick's younger son no longer wishes to talk with Derrick on the phone because his bond with Derrick has been progressively weakened by Christine.

6. Christine failed to keep Derrick informed about his sons' school activities and/or grades.

7. Christine failed to keep Derrick informed about the health concerns of their sons and told Derrick that he did not need to know such information.

8. Christine failed to keep Derrick informed as to her current address and phone number.

9. Christine did not allow Derrick to have his 2003 summer visitation, told Derrick that she did not have to do this because Derrick had visited the children prior to Christine leaving with them to California.

10. Christine refused to send the boys to visit Derrick during Christmas 2003.

11. Derrick asked Christine for a "make-up" Christmas time visit from December 25 to January 26, but Christine refused because she could not afford to pay to fly to Hawai'i to pick up the boys.

At the July 7, 2004 hearing on Derrick's May 4, 2004 Motion, Christine admitted that when she moved into her own apartment she did not inform Derrick until three weeks after she moved. Christine also admitted "that our youngest son did go to the emergency room in July [of 2003] and [she] did not inform [Derrick] just because of we don't get along. We don't get along. We don't communicate, it's a true fact. And that is my fault that I did not tell him." Christine further testified, in relevant part:

> Q. Was this issue addressed by your lawyer, Adrienne King, to [sic] a letter on January 13, 2004, which is Defendant's Exhibit K?
>
> A. Yes. [Derrick] was claiming that I don't tell him of any health concerns. And what my previous lawyer Adrienne King was trying to say, that I don't have to tell him about every single doctor visit, just the ones that are a health concern. And that's what he was upset about, that they were going for their shots. When we first moved there, they had to get shorts to start school. I did not inform him of those things. Like I said, I am wrong in not telling him about the emergency situation, I should have told him about that.

A. . . . [W]hen I first moved there, the boys started preschool June 18. If this were to go farther, the school can verify, Judge, this pamphlet was sent to him plus these forms to sign and return. . . .

So this was the week of June 18, this was mailed to him to sign and return and he never did. So that's why he has not received a single thing. . . . So I was doing good faith in trying to send him information.

When Christine was asked whether she would be in the near proximity to overhear what the children would say when Derrick would call to speak to his sons, Christine testified as follows:

A. Yeah, actually I had to be, like I said, because I felt there wasn't good conversation, I did always stay nearby. I did, and I know I'm not supposed to do this, I did record conversations. [Derrick] does not know I recorded it and I know I'm wrong in doing that. But because of the fact I did not approve of the conversations, and if we ever had to come to court because I knew he was upset about - - he would always threaten that he'd take me to court for this and that.

At the conclusion of the hearing, the court stated, in relevant part:

I believe the problem basically stems from the fact that the two of you do not

> communicate well with each other. What makes it even more difficult is that you do not reside in the same geographic area. [Derrick] is here, [Christine] and the two boys are in California, that makes communication even more difficult. So in order to avoid problems like this in the future, the two of you have to learn to communicate effectively. All right.

On July 7, 2004, after the hearing, the court entered the following order:

> [Derrick's] [r]equests are all denied with the exception of Christmas 2004 in which [Derrick's] visitation with the parties' children shall be from December 14th, 2004 through January 6, 2005. Each party shall bear their own attorneys fees.

On July 27, 2004, Derrick filed a Notice of Appeal from the July 27, 2004 Order.

On September 17, 2004, Judge Kuriyama entered findings of fact and conclusions of law (FsOF and CsOL), stating, in relevant part:

> FINDINGS OF FACT:
>
> . . . .
>
> 8. Plaintiff testified that Judge Suemori had suggested that due to the transition of moving to another state, Defendant should go to visit the children in California so that he could see where they were going to school and where they were

going to live. The Court insisted on this because the children were only 2 and 3 years of age at that time and were relocating to the State of California.

. . . .

10. After Plaintiff had moved to California, Defendant did not request to come to California and pick up the boys. He did not send Plaintiff a ticket for the children to come to Hawaii for the summer. There was no communication about summer visitation for the summer of 2003 between the parties.

11. Defendant called Plaintiff on September 13, 2003 requesting the children for visitation during Christmas vacation. Plaintiff told Defendant that she could not financially afford to send the children to Hawaii for Christmas because of the costs she had incurred in moving to California and that she had to pay for a very expensive divorce. Defendant became very upset. Defendant sent Plaintiff a letter stating that he wanted visitation with the children during Christmas vacation. Plaintiff informed Defendant Christmas vacation was in alternate years and that the children would come and visit with him the following Christmas.

12. When Plaintiff first moved to California, she provided Defendant with her address and phone number where she would be temporarily staying with her Aunt Terry and Uncle Dave. Defendant called

and was informed that Plaintiff and the children were at Plaintiff's Aunt Julie's home. Defendant was upset and contacted Plaintiff. Defendant continued to call and was able to speak with his children.

13. When Plaintiff moved to own apartment, she did not immediately inform Defendant as to her new address and phone number. She did provide that information to Defendant in writing about three (3) weeks later as to her new address and telephone number.

14. Defendant receives medical records regarding the parties' children from the insurance care provider. Plaintiff did not inform Defendant on an occasion in which the parties' son went to the emergency room for treatment. Plaintiff's prior counsel, Adrienne King, addressed this issue to Defendant's counsel in a letter dated January 13, 2004. . . .

15. The parties' children began pre-school on June 18, 2003. Plaintiff testified that the school, pamphlet was sent to Defendant. Defendant was to have signed the pamphlet and return it to the school but never did so. Plaintiff explained that this was the reason why the school had not sent Defendant materials regarding the children's schooling.

16. Prior to the parties' divorce, on August 14, 2002 the parties were ordered to participate in parenting counseling with

June Ching. Plaintiff contacted June Ching and participated in parenting counseling every month until she relocated. Defendant did not contact June Ching nor did he participate in parenting counseling. Defendant claimed that his prior counsel did not provide him with a copy of the Order requiring him to participate in parenting counseling. However, Defendant signed the Order and was present in Court when the Order was made as well as being told by the Presiding Judge to attend the parenting counselling.

17. The parties have had problems in communicating with each other. In the past, Plaintiff felt she was unable to effectively communicate with Defendant because he would put her down or yell at her. Plaintiff believes that parenting counseling would have helped the parties in communicating with each other.

18. Defendant has had telephone contact with the parties' children. Plaintiff has not interfered with Defendant's telephone communications with the children. On occasions she has had to calm the children down because they got very excited when they spoke with Defendant. The youngest child has not wanted to speak with his father on various occasions. Plaintiff believes that this is due to his young age.

. . . .

20. Plaintiff accompanied the children to Hawaii so that they could have visitation

with their Father over the summer (2004) for six weeks. Plaintiff stayed in Hawaii during the summer visit and returned the children to their home in California after the summer visitation.

21. Defendant asked for twelve (12) weeks over the summer on the basis that he did not get visitation over the prior year's (2003) summer.

22. Plaintiff has not interfered with Defendant's visitation rights with the parties' two children.

23. On the issue of custody and visitation, the Court finds that there has been no material change in circumstances.

CONCLUSIONS OF LAW

. . . .

4. Plaintiff is not in contempt of Court.

5. The divorce decree and the amended divorce decree does [sic] not provide for "make up" visitation and therefore, Defendant's request for making summer visits for twelve (12) weeks is denied.

6. Defendant's requests to require that summer visitation every summer be twelve (12) weeks and that Plaintiff would be required to send the children to Hawaii every Christmas as part of the further Amended Decree is denied.

7. Defendant's request for an appointment of custody evaluator is denied.

8. Each party shall bear their own attorney's fees and costs incurred herein.

The appeal was assigned to this court on February 9, 2005.

DISCUSSION

In general, Derrick contends that (1) the court manifested bias against him so as to deny him due process by denying him a fair hearing before an impartial court and (2) Christine, in a July 2, 2004 affidavit, attempted to trade on the maternal preference doctrine by painting a negative personality picture of Derrick. In sum, Derrick contends,

> The Court engaged in expectancy confirmation bias. It allowed [Christine] to trade on her personality portrait of [Derrick] as both a bad litigant and a bad parent. [Derrick's] evidence, that Plaintiff violated his visitation and/or contract rights, varied greatly from the Court's stereotypical expectations concerning woman [sic] being better parents than men. Thus, the Court negatively adapted to [Derrick's] evidence. It engaged in a creative interpretation of HRE Rule 611(a) to distort [Derrick's] side of the case. In so doing, it manifested systematic bias against [Derrick].

We interpret Derrick's points of error[3] to be, and respond to them, as follows:

1. Derrick clearly stated his allegations in and/or with his May 4, 2004 Motion. At the July 7, 2004 Motion. At the July 7, 2004 hearing, the court first had Christine testify in response to Derrick's allegations and then had Derrick testify in response to Christine's testimony. Derrick asserts two complaints about this procedure. First, he contends that the court disregarded the principle of law that a movant should present his case first because he has the burden of proof. He complains that when he testified he was required to (a) counter Christine's evidence and (b) present his own evidence. Second, he contends that when the court allowed him to present his evidence, it did so under such tremendous time pressure that it effectively hampered his presentation. Upon a review of the record, we conclude that the court's procedure was not an abuse of its discretion.

2. Derrick asserts that the court erroneously admitted Christine's irrelevant and/or unfairly prejudicial evidence. Specifically, he contends as follows:

> In this case, there were two factual issues in dispute: (1) whether [Christine] had violated the terms and conditions of the amended divorce decree, (2) whether [Christine]'s violations engendered a material change in circumstances, and/or (3) whether [Christine]'s actions were

[3] In stating the points of error, the opening brief does not comply with the explicit requirements of the Hawai'i Rules of Appellate Procedure Rule 28(b)(4) (2005).

> against the children's best interests. Despite this focus, the Court allowed [Christine] to testify that, prior to the original divorce decree being granted, she had attended parenting counseling while [Derrick] did not, even though they both had been ordered to do so because they did not get along. [Derrick] objected to the admission of this evidence on the grounds that this was beyond the issue of [Christine]'s contemptuous conduct. The court overruled [Derrick] and stated that it was relevant to the issues he had raised.

Upon a review of the record, we conclude that the court did not abuse its discretion. Christine's testimony was relevant to Derrick's request for sole physical custody of the two boys.

3. Derrick asserts that the court unfairly administered the proceedings so as to systematically admit Christine's hearsay evidence while excluding Derrick's hearsay evidence. He contends that the court, influenced by Christine's negative picture of Derrick, denied Derrick due process in a series of evidentiary rulings. Upon a review of the record, we conclude that the court did not abuse its discretion.

4. Derrick asserts that the court

> used an incomplete legal standard. One, it focused on only the issue of whether a material change in circumstances had occurred and completely ignored the issue of what was in the children's best interests. Two, in addressing the material change issue, the Court, operating on the basis of

> anti-male bias, perceptually filtered out [Derrick]'s evidence and, thus, arrived at a distorted decision. These Court actions caused a substantial detriment to [Derrick] as the Court took minimal steps to repair the damage that [Christine] had done to his relationship with his sons.

Specifically, Derrick contends that "the material change in circumstances that occurred upon [Christine's] move, was her systematic interference with both [Derrick's] visitation and contact rights. As a result of [Christine's] behavior, [Derrick's] psychological relationship with the boys was weakened. This was not in their best interest." Upon a review of the record, we conclude that the court did not abuse its discretion.

5. Derrick asserts that the court abused its discretion when it did not find Christine in civil contempt. Upon a review of the record, we disagree. Proof of a party's past violations of a court order is not proof that the party is currently "in civil contempt."

6. Derrick contends that the court abused its discretion when it decided not to modify its custody order. Upon a review of the record, we disagree.

We now review the disputed FsOF. FOF no. 8 contains two errors of law. First, a statement of a party's testimony is not a finding of fact. Second, the testimony by Christine that a prior court had "suggested that due to the transition of moving to another state, Defendant should go to visit the children in California so that he cold see where they were going to school and where they were going to live" and that "[t]he Court insisted on this because the

children were only 2 and 3 years of age at that time and were relocating to the State of California" is hearsay as it is not supported by the record on appeal because there is no transcript. Moreover, if Judge Suemori had "insisted on this" as alleged by Christine, it was incumbent upon Judge Suemori to do so in the May 7, 2003 Order and/or the May 13, 2003 Amended Decree. In the absence of a court order in the record on appeal requiring Derrick to visit his children in California, Derrick cannot be faulted or penalized for not doing so.

In light of the record, FOF no. 10 is not clearly erroneous.

FOF no. 11 states facts that do not establish a violation of the May 13, 2003 Amended Decree because the latter did not require Derrick's alternate Christmas visitation to commence in 2003. It permitted it to commence in 2003 or 2004 "as arranged by the parties."

FsOF nos. 13 and 14 state facts proving Christine's violations of orders contained in the May 13, 2003 Amended Decree.

FOF no. 15 misses the point. The May 13, 2003 Amended Decree requires that "Mother shall keep Father informed of the boy's [sic] school activities and grades, sending him reports in a timely fashion." It does not impose any requirement on Derrick. It does not permit Christine, and it does not require Derrick to permit Christine, to assign her obligation to the school(s). Thus, Christine violated this provision of an order contained in the May 13, 2003 Amended Decree.

FOF no. 16 is not clearly erroneous and is relevant to Derrick's request for a change of custody. On the other hand, nothing in the record supports the following statement by counsel for Christine at the July 7, 2004 hearing:

> But, your Honor, the key problem in this whole thing is that there's talk about violation or contempt, but it started all with [Derrick], and all of this could have been avoided if he listened to the court order. He was in court on August 14, he was ordered to parenting counseling with June Ching. If he started it at that time - - and he never went, Your Honor, a lot of this could have been avoided.

This statement erroneously assumes that June Ching's parenting counseling would have been more successful with Derrick than it was with Christine.

The court's statements to the parties that "the problem basically stems from the fact that the two of you do not communicate well with each other" and that "in order to avoid problems like this in the future, the two of you have to learn to communicate effectively" and FsOF nos. 16 and 17 state facts reaffirming the ultimate fact that the court's visitation orders are not now, and never have been, appropriate in this situation because they require too much cooperation between non-cooperating parties who have serious problems communicating with each other. The statement that "Plaintiff believes that parenting counseling would have helped the parties in communicating with each other" is irrelevant.

The second sentence in FOF no. 18 stating that "Plaintiff has not interfered with Defendant's telephone communications with the children" appears to be clearly erroneous. Christine admitted recording those conversations while "nearby" to the children. Absent any evidence to the contrary, it is reasonable to assume that the children were aware of these recordings. If the children were aware of these recordings, FOF no. 18 is clearly erroneous.

COL no. 4. that "Plaintiff is not in contempt of Court" is right. But Derrick sought sanctions against Christine for Christine's past violations of the court's orders. The court failed to respond to this request.

CONCLUSION

Accordingly, we affirm the court's decisions regarding custody and contempt. We vacate FsOF nos. 8 and 15, the last sentence of FOF no. 17, and the second sentence of FOF no. 18. We remand for reconsideration (1) of the issues presented by vacated FOF no. 15, (2) whether FOF no. 18 is clearly erroneous and, if it is, of what should be done about it, (3) of what should be done regarding the violations noted in FsOF nos. 13 and 14, (3) whether the parties have the financial ability to comply with the visitation orders, and (4) of the visitation orders in light of (a) the fact that Christine and Derrick do not communicate well with each other, and (b) the financial abilities of the parties.

DATED: Honolulu, Hawai'i, October 26, 2005.

On the brief:

Brian Custer
for Defendant-
Appellant.

s/ James A. Burns
Chief Judge

s/ John Lim
Associate Judge

s/ Craig H. Nakamura
Associate Judge

IV. DEFENDANT-APPELLANT'S OPENING BRIEF

S.C. NO. 26726

IN THE SUPREME COURT

OF THE STATE OF HAWAII

CHRISTINE M. WONG	)	FC-DIVORCE NO.
	)	02-1-2233
Plaintiff-Appellee,	)	
	)	APPEAL FROM THE
vs.	)	ORDER DENYING
	)	MOTION TO MODIFY
DERRICK H. WONG,	)	CUSTODY AND/OR
	)	HOLD PLAINTIFF IN
Defendant-Appellant	)	CONTEMPT OF
	)	AMENDED DIVORCE
	)	DECREE FILED
	)	05/14/04

FIRST CIRCUIT COURT

HONORABLE ALLENE SUEMORI,
HONORABLE WILLIAM WALLACE,
HONORABLE DARRYL CHOY,
HONORABLE CHRISTINE KURIYAMA,
HONORABLE GREGG YOUNG,
Judges

DEFENDANT-APPELLANT'S OPENING BRIEF

EXHIBIT "A"

EXHIBIT "B"

And

CERTIFICATE OF SERVICE

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exceeded the bounds of reason or disregarded rules of principles of law to the substantial detriment of a

party litigant. Booker v. Midpac Lumber Co., Ltd 649 P.2d 376 (Haw. 1982)

Point of Error Number 5, the trial court's holding that Mother was not in contempt was an abuse of discretion. To constitute an abuse of discretion it must appear that the court clearly exceeded the bounds of reason or disregarded rules of principles of law to the substantial detriment of a party litigant. Booker v. Midpac Lumber Co., Ltd 649 P.2d 376 (Haw. 1982)

Point of Error Number 6, the trial court's holding that custody should not be modified was an abuse of discretion. To constitute an abuse of discretion it must appear that the court clearly exceeded the bounds of reason or disregarded rules of principles of law to the substantial detriment of a party litigant. Booker v. Midpac Lumber Co., Ltd 649 P.2d 376 (Haw. 1982)

IV

ARGUMENT

A. THE LOWER COURT COMMITTED REVERSIBLE ERROR WHEN IT MANFIESTED BIAS AGAINST FATHER TO DENY HIM DUE PROCESS

The fifth amendment to the United States Constitution states that "no person shall be. . . . deprived of life, liberty or property without due process of law". Article I, Section 5 of the Hawaii State Constitution makes equivalent provision. A parent has a liberty interest in a developed parent-child relationship. Lehr v. Robertson, 463 U.S. 248, 103 S Ct. 2985, 72 L. Ed. 2d 614 (1983) The due process clause requires a fair hearing before an impartial

court. Schweiker v. McClure 456 U.S. 188, 102 S. Ct. 1665, 72 L. Ed 2d 1 (1982)

In a fair tribunal, it is fundamental that Judges shall apply law impartially and free from influence of any personal biases. Donald C. Nugent, Judicial Bias, Cleveland State Law Review, Wntr 1994 v42 n1 p1-59. Judges' search for truth, however, is hampered by natural perceptual processes that occur when they extract, organize and use information. (Id.) The brain uses simplifying strategies, called schemata, which help reduce and integrate complex information. (Id.) The overloaded legal system, plagued with constraints of time, exacts a price paid for efficiency. (Id.) This price is bias in perception and judgment. Judges' perceptions become schemata-driven; i.e., impervious to new information. (Id.) This makes it easier for them to make snap judgments, distort facts, and prejudge new ideas rather than be objective. (Id.) The influence of schemata on perception and decision-making exists in the following three areas. (Id.)

One, attention: schemata tell a decision-maker what to expect. (Id.) Information that confirms to schemata draws attention; i.e., expectancy-confirmation bias. (Id.) Some attorney's trade on this perceptual defect; e.g., they try to paint a personality picture of a party as a "chronic litigant". (Id.) When information varies greatly from a Judge's expectations, it is likely to be attended to but Judges will distort the information to fit it into preexisting expectations. (Id.) Or else they creatively interpret the law to reach a "just decision". (Id.)

Two, adaptation: not everything noticed gets committed to memory. (Id.) When Judges adapt negatively, they filter stimuli out. (Id.) There is a

positive adaptation to schemata-consistent information. (Id.) In an overly burdened legal system, the imperative of organizational efficiency feeds the perpetuation of legal stereotypes. (Id.) Positive adaptation to stereotypic traits elicits selective evidence processing, i.e., evidence which corroborates a stereotype's implications is more often incorporated into decision-maker thinking. (Id.)

Three, organization: this is the means by which Judges assign relevance to stimuli. (Id.) Judges' decisions are influenced by such factors as their legal and political orientations. (Id.) These factors instill attitudes in Judges which facilitate the organization of information. (Id.) This process can result in distorted and systematically biased decisions. (Id.)

Gender bias is one example of a perceptual basis for distorted decision-making. (Id.) This involves misconceptions about the social and economic realities of men's lives. (Id.) Such misconceptions are prevalent in the justice system and are seen most frequently in the area of Family Law. (Id.) Gender-based biases negatively impact the treatment of cases. (Id.) Child custody is an arena where bias concerning both sexes influences decision-making. (Id.) Bias against fathers is witnessed by the persistent application of the maternal preference doctrine. (Id.) Although eliminated from the books, it still operates in practice. (Id.) The perpetual assumption is that mothers are characterized as self-sacrificing and nurturing and are better caregivers. (Id.) Fathers are perceived as less capable and must prove their ability to parent. (Id.)

1. MOTHER DELIBERATELY PAINTED A NEGATIVE PERSONALITY PICTURE OF FATHER PRIOR TO THE HEARING

[Note: The above discussion is incorporated herein below to the extent appropriate]

On July 2, 2004 Mother filed a Responsive Affidavit to counter Father's motion. In it she attempted to trade on the maternal preference doctrine by painting the following negative personality picture of Father. One, she labeled him a bad litigator because he: (a) had been defaulted, (b) raised merit-less issues, (c) unilaterally sought to modify the amended divorce decree, and/or (d) resented paying child support. In addition, Mother attempted to paint father as having inadequate parenting skills because: (a) he put himself before the children, (b) he acted out aggressively against her and the children, and/or (c) need to be ordered to attend parenting classes. (Note: Father refuted each and every one of these claims in a Reply Affidavit filed on July 6, 2004.)

2. THE COURT, INFLUENCED BY MOTHER'S NEGATIVE PICTURE OF FATHER, DENIED FATHER DUE PROCESS IN A SERIES OF EVIDENTIARY HEARINGS

   a. THE COURT MISHANDLED THE MODE AND ORDER OF PRESENTATION OF EVIDENCE

[Note: The above discussion is incorporated herein below to the extent appropriate]

Hawaii Rule of Evidence ("HRE"), Rule 611: Mode and order of presentation, (a) Control by court: states that the court shall exert reasonable control over the mode and order of presentation of evidence so as to (1) make the presentation effective for the ascertainment of truth. The commentary to this rule says that

section (a) states the common law principle of allowing a court broad discretion. However, abuse of discretion is more often found when a judge unduly curbs examination. State. v. Altergott, 57 Haw. 492, 559 P.2d 728 (1977)

Mother, as plaintiff, filed the complaint for divorce in this case. However, Father was the movant for this motion. Father sought transfer of physical custody, or, in the alternative, increased Summer and Christmas visitation, attorney's fees, and/or appointment of a custody evaluator. Thus, Father had to sustain the burden of proof.

However, having read Mother's Responsive Affidavit (which characterized Father as both a bad litigator and a bad parent) the Court had Mother present her side of the case first. Worse, before Father could begin to present evidence, the Court attempted to cut off the taking of evidence. When Father objected to the manner in which the Court was conducting proceedings, the Court noted that he had spent time arguing on his own behalf. Father corrected the Court that his argument was in response to points raised by Mother. It was only when Mother stated that she had covered everything that the Court allowed father to present his evidence. However, it did so under such tremendous time pressure that it effectively hampered Father's presentation.

Thus, the Court committed reversible error. It exercised unreasonable control as it challenged Father to both counter Mother's evidence and then present his own evidence to sustain his burden of proof. Further, the Court manufactured constant time pressure to ensure that this doubled burden could not be met. In unduly curbing Father's examination, the Court

abdicated its search for the truth as coming from a consideration of both Father and Mother's positions. Thus, the Court abused its discretion as it disregarded the principle of law that a movant should present its case first because it has the burden of proof. This, in turn, created a substantial detriment to Father.

The Court engaged in expectancy confirmation bias. It allowed Mother to trade on her personality portrait of Father as both a bad litigant and a bad parent. Father's evidence, that Mother violated his visitation and/or contact rights, varied greatly from the Court's stereotypical expectations concerning woman being better parents than men. Thus, the Court negatively adapted to Father's evidence. It engaged in a creative interpretation of HRE Rule 611(a) to distort Father's side of the case. In so doing, it manifested systematic bias against Father.

b. THE COURT ADMITTED IRRELEVANT AND/OR UNFAIRLY PREJUDICIAL EVIDENCE

[Note: The above discussion is incorporated herein below to the extent appropriate]

HRE Rule 401, Definition of relevant evidence: states that relevant evidence is evidence having any tendency to make a fact of consequence more or less probable. To determine whether a fact has consequence to a dispute a judge must look to the substantive law.. Bowman, Hawaii Rules of Evidence Manual, 66-67 1990

HRE Rule 403, Exclusion of relevant evidence on grounds of prejudice: states that although relevant, evidence may be excluded if its probative value is

substantially outweighed by unfair prejudice. Unfair prejudice is an undue tendency to suggest a decision on an improper basis, commonly an emotional one. Kaeo v. Davis, 68 Haw. 447, 719 P. 2d 387 (1986) Unfairly prejudicial evidence is evidence which supports two inferential thrusts and one of these forbidden Bowman, 85. Bowman also notes that the dispute index, the degree to which a fact is actually disputed and really in issue, must be considered and/or whether other evidence is available. Id. at 82-84

In this case, there were two factual issues in dispute: (1) whether Mother had violated the terms and conditions of the amended divorce decree, (2) whether Mother's violations engendered a material change in circumstances, and/or (3) whether Mother's actions were against the children's best interests. Despite this focus, the Court allowed Mother to testify that, prior to the original divorce decree being granted, she had attended parenting counseling while Father did not, even though they both had been ordered to do so because they did not get along. Father objected to the admission of this evidence on the grounds that this was beyond the issue of Mother's contemptuous conduct. The court overruled Father and stated that it was relevant to the issues he had raised.

It was error to admit this evidence because the fact of Father's non-attendance of parenting counseling was not in dispute. That is, such non-attendance had already been taken into account when the Court originally awarded Mother sole physical custody when it granted the default divorce in 2003. According to Crow, the only issue in dispute on the issue of contempt as this related to custody modification was whether Mother had abused her position as sole physical custodian. The fact that Father did not attend parenting counseling produced two inferential

thrusts: (1) that he was a bad parent, and (2) that he was a bad partner for Mother. The first thrust was unfairly prejudicial because it traded further on the Court's maternal-preference-doctrine bias; it continued to paint the pre-hearing negative personality picture of Father as a bad parent. In the overly burdened Family Court legal system, it produced negative adaptation and elicited selective evidence processing against Father's testimony. As it triggered the Court pre-existing assignment of irrelevance to Father's evidence, it led to a distorted decision. Further, Mother introduced such evidence to try to prove that Father was a bad partner. However, there was other evidence Mother, in fact, introduced concerning her problematic, post-divorce interactions with Father. Thus, the Court misapplied HRE Rules 401 and 403 to the substantial detriment of Father, and, thus, it abused its discretion.

c. THE COURT MISAPPLIED THE RULES OF EVIDENCE, UNFAIRLY ADMINISTERED THE CASE, UNJUSTLY DETERMINED THE PROCEEDINGS, AND DID NOT ASCERTAIN THE TRUTH OF THE CHILDREN'S SITUATION

[Note: The above discussion is incorporated herein below to the extent appropriate]

HRE Rule 102 Purpose and construction: states that these rules shall be construed to secure fairness in administration and promotion of the development of law of evidence to the end that truth may be ascertained and proceedings justly determined. In non-jury trials: Wigmore generally favors relaxation of the rules of evidence. Wigmore, Evidence, Section 4d.1 (Tillers Rev. 1983). Weinstein asserts that Rule 102

paves the way for a less restrictive application of the rules in bench trials. J. Weinstein & M. Berger, Weinstein's Evidence Paragraph 102 [02] (1988). Hawaii courts have stated that legal scholars question the desirability of strict adherence to exclusionary rules of evidence in non-jury proceedings. Bates v. Ogata, 52 Haw. 573, 482. P.2d 1532 (1971)

The Court allowed Mother to testify, over objection, that she had entered into an agreement regarding the divorce and that Father was not present when this occurred. She also testified, over objection, that the Judge said she could move to California, that Father would have every weekend to visit with the kids before the move, and that, because of their age, Father should come to California. The Court also allowed Mother to testify, over objection, that she gave Father the phone number of her aunt and uncle in California and that she had the telephone records to prove that he had called these people. The Court allowed all of this hearsay into the record.

The Court subsequently took "judicial notice of the entire record and files in the case". Father noted that his post-May 19, 2004 hearing exhibits were marked "N" through "G'" and that all of these exhibits had already been included in the motions and documents he had filed. Father then moved them into evidence to develop a complete record.

The Court excluded Father's Exhibit "O" (Father's second attorney's affidavit) as hearsay. The Court excluded Father's "E'" because it was a hearsay portion of e-mail. The Court also admitted Father's Exhibit "B'" (Father's September 20, 2003 letter to Mother) because Mother did not object to it. On the same grounds, the Court received both Father's Exhibit "C'" (the children's medical benefit explanations) and

Father's Exhibit "F"" (Mother's June 1, 2004 letter to Father).

In short, the Court consistently admitted hearsay evidence when Mother introduced it but excluded such evidence when Father introduced it and Mother objected to it. Father's evidence varied greatly from the Court's expectancy confirmation bias; i.e., it showed that Mother's contemptuous actions created a materially changed Father's relationship with his sons in a manner against their best interests. Thus, the Court acted to distort said evidence via a "creative" interpretation of the law; i.e., it admitted Mother's hearsay evidence while excluding Father's hearsay evidence. Such rulings violated HRE Rule 102. That is, the Court unfairly administered the application of the rules of evidence in this case. The Court did not seek to ascertain truth as a product of the presentation of evidence by both parties. Rather, the Court negatively adapted to Father's evidence and strove to filter it out. The Court's pre-existing, anti-male as parent, attitudes influenced it to make these systematically biased evidentiary rulings. Thus, the Court acted to develop only Mother's truth for the record. As a result, the proceedings were not justly determined. Further, when the Court misapplied HRE Rule 102 to the substantial detriment of Father in these proceedings, it abused its discretion.

B. THE LOWER COURT COMMITTED REVERSIBLE ERROR WHEN IT ABUSED ITS DISCRETION AND USED AN INCOMPLETE AND, THUS, INCORRECT LEGAL STANDARD

[Note: The above discussion is incorporated herein below to the extent appropriate]

The legal standard for custody modification, as spelled out in HRS Section 571-46(6), is the best interest of the child standard. Case law, adds the necessity to prove that such modification is necessary due to a material change in circumstances. Nadeau v. Nadeau, 861 P.2d 754 (Haw. App. 1993) At the hearing, Mother stated that the only test was whether a material change in circumstances had occurred.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

IN THE FAMILY COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

CHRISTINE M. WONG Plaintiff, vs. DERRICK H. WONG, Defendant.	FC-DIVORCE NO. 02-1-2233 FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING MOTION TO MODIFY CUSTODY AND/OR HOLD PLAINTIFF IN CONTEMPT OF AMENDED DIVORCE DECREE FILED ON MAY 4, 2004 Hearing: July 17, 2004 Time: 8:30 a.m. Judge: Honorable Christine Kuriyama

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING MOTION TO MODIFY CUSTODY AND/OR HOLD PLAINTIFF IN CONTEMPT OF AMENDED DIVORCE DECREE FILED ON MAY 4, 2004

DEFENDANT, DERRICK K.H. WONG'S Motion to Modify Custody and/or hold Plaintiff in Contempt of Amended Divorce Decree filed on May 4, 2004 came on for hearing on July 7, 2004 before the Honorable Christine Kuriyama, Judge of the above-entitled court on July 7, 2004 at 8:30 a.m.. Defendant was

represented by BRIAN CUSTER and Plaintiff was represented by BLAKE T. OKIMOTO. The Court being fully advised in the premises, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT:

1. The Court takes judicial notice of the records and files herein.

2. Plaintiff Christine M. Wong is a resident of Lancaster, California and a former resident of the City and County of Honolulu, State of Hawaii.

3. The parties are parents of Devin Ju Ying Wong born on February 23, 2001 and Dillon Ju Wing Wong born on September 30, 1999.

4. The parties were divorced in the Family Court of the First Circuit, State of Hawaii pursuant to a Decree Granting Absolute Divorce and Awarding Child Custody on April 3, 2003 and an Amended Decree Granting Absolute Divorce and Awarding Child Custody was entered and filed on May 13, 2003, (hereinafter referred to as Amended Divorce Decree). In the parties' Amended Divorce Decree both parties were awarded joint legal custody of their minor children, Devin Ju Ying Wong and Dillon Ju Wing Wong. Plaintiff was awarded sole physical custody subject to Defendant's rights of visitation as set forth in the Amended Divorce Decree.

5. The Amended Divorce Decree stated that Mother is relocating to Southern California and that Father is to have visitation every summer for six (6) weeks, and every other Christmas/New Year's vacation as arranged by the parties. The Amended Divorce Decree also stated that as Mother would be moving to California on or about June 1, 2003, Father shall have visitation with the children for the weekends of April

25, May 2, May 16 and May 23, 2003. Additional visitation as the parties' schedules was allowed shall be agreed upon by the parties with 24 hours notice given to Mother.

6. Defendant filed his Motion to Modify Custody and/or Hold Plaintiff in Contempt of Amended Divorce Decree on May 4, 2004 wherein he sought the following:

(1) Transfer custody of the children to Father;

(2) Order Mother to send the two sons to Hawaii for twelve (12) weeks of visitation this summer (2004);

(3) Order Mother to send the two sons to Hawaii for four (4) weeks of visitation this Christmas (2004);

(4) Make orders (2) and (3) permanent parts of a further Amended Divorce Decree (i.e. from 2004 onward");

(5) Find Mother in contempt for her repeated violations of the Amended Decree.

(6) Have Mother pay Father's attorney's fees to having to bring this motion; and/or

(7) Appoint a custody evaluator to investigate this case and have Mother pay for said investigation

7. Plaintiff was allowed to relocate to Southern California with the children. Prior to the relocation, Defendant was to have the children every weekend with the exception of Mother's Day weekend where he previously had every other weekend. Also he would be able to have the children every night until 7:00 p.m.

Defendant took every weekend as allowed under the Amended Divorce Decree but did not take additional days during the week.

8. Plaintiff testified that Judge Suemori had suggested that due to the transition of moving to another state, Defendant should go to visit the children in California so that he could see where they were going to school and where they were going to live. The Court insisted on this because the children were only 2 and 3 years of age at that time and were relocating to the State of California.

9. One day prior to Plaintiff's relocation to Southern California, Defendant through his lawyer, requested that Plaintiff leave the children in Honolulu, Hawaii. Plaintiff again restated to Defendant that he should come to California to visit with them and help in their transition.

10. After Plaintiff had moved to California, Defendant did not request to come to California and pick up the boys. He did not send Plaintiff a ticket for the children to come to Hawaii for the summer. There was no communication about summer visitation for the summer of 2003 between the parties.

11. Defendant called Plaintiff on September 13, 2003 requesting the children for visitation during Christmas vacation. Plaintiff told Defendant that she could not financially afford to send the children to Hawaii for Christmas because of the costs she had incurred in moving to California and that she had to pay for a very expensive divorce. Defendant became very upset. Defendant sent Plaintiff a letter stating that he wanted visitation with the children during Christmas vacation. Plaintiff informed Defendant Christmas vacation was in alternate years and that the children would come and visit with him the following Christmas.

12. When Plaintiff first moved to California, she provided Defendant with her address and phone number where she would be temporarily staying with her Aunty Terry and Uncle Dave. Defendant called and was informed that Plaintiff and the children were at Plaintiff's Aunt Julie's home. Defendant was upset and contacted Plaintiff. Defendant continued to call and was able to speak with his children.

13. When Plaintiff moved to her own apartment, she did not immediately inform Defendant as to her new address and phone number. She did provide that information to Defendant in writing about three (3) weeks later as to her new address and telephone number.

14. Defendant receives medical records regarding the parties' children from the insurance care provider. Plaintiff did not inform Defendant on an occasion in which the parties' son went to the emergency room for treatment. Plaintiff's prior counsel, Adrienne King, addressed this issue to Defendant's counsel in a letter dated January 13, 2004. See Defendant's Exhibit "K" in evidence.

15. The parties' children began pre-school on June 18, 2003. Plaintiff described that the school pamphlet was sent to Defendant. Defendant was to have signed the pamphlet and return it to the school but never did so. Plaintiff explained that this was the reason why the school had not sent Defendant materials regarding the children's schooling.

16. Prior to the parties' divorce, on August 14, 2002, the parties were ordered to participate in parenting counselling with June Ching. Plaintiff contacted June Ching and participated in parenting counselling every month until she relocated. Defendant did not contact June Ching nor did he

participate in parenting counselling. Defendant claimed that his prior counsel did not provide him with a copy of the Order requiring him to participate in parenting counselling. However, Defendant signed the Order and was present in Court when the Order was made as well as being told by the Presiding Judge to attend parenting counselling.

17. The parties have had problems in communicating with each other. In the past, Plaintiff felt she was unable to effectively communicate with Defendant because he would put her down or yell at her. Plaintiff believes that parenting counselling would have helped the parties in communicating with each other.

18. Defendant has had telephone contact with the parties' children. Plaintiff has not interfered with Defendant's telephone communications with the children. On occasions she has had to calm the children down because they got very excited when they spoke with Defendant. The youngest child has not wanted to speak with his father on various occasions. Plaintiff believes that this is due to his young age.

19. The parties made arrangements for the children to visit with their Father in Honolulu, Hawaii over the summer of 2004. These arrangements were made prior to Defendant filing this instant motion and serving Plaintiff with said Motion.

20. Plaintiff accompanied the children to Hawaii so that they could have visitation with their Father over the summer (2004) for six weeks. Plaintiff stayed in Hawaii during the summer visit and returned the children to their home in California after the summer visitation.

21. Defendant asked for twelve (12) weeks over the summer on the basis that he did not get visitation over the prior year's (2003) summer.

22. Plaintiff has not interfered with Defendant's visitation rights with the parties' two children.

23. On the issue of custody and visitation, the Court finds that there has been no material change in circumstances.

CONCLUSIONS OF LAW

1. The Family Court of the First Circuit, State of Hawaii has jurisdiction to enter this order.

2. Defendant's requests are all denied, except that for the Christmas vacation in 2004, Defendant's visitation shall be from December 14, 2004 through January 6, 2005.

3. There has been no material change in circumstances regarding the issue of custody and visitation.

4. Plaintiff is not in contempt of Court.

5. The divorce decree and the amended divorce decree does not provide for "make up" visitation and therefore, Defendant's request for making summer visits for twelve (12) weeks is denied.

6. Defendant's requests to require that summer visitation every summer be twelve (12) weeks and that Plaintiff would be required to send the children to Hawaii every Christmas as part of the further Amended Decree is denied.

7. Defendant's request for an appointment of custody evaluator is denied.

8. Each party shall bear their own attorney's fees and costs incurred herein.

DATED: Honolulu, Hawaii, September 17, 2004.

BY THE COURT:

s/ Christine E. Kuriyama
JUDGE OF THE ABOVE-ENTITLED COURT

cc: Blake T. Okimoto, Esq.
Attorney for Plaintiff-Appellee

Brian Custer, Esq.
Attorney for Defendant-Appellant